Supreme Court, U.S.
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No. 71-154

IN THE

Supreme Court of the United States

October Term 1971

MICHAEL A. TOUGHER, JR. and
AMELIA L. TOUGHER, *Petitioners*,

v.

COMMISSIONER OF INTERNAL
REVENUE, *Respondent.*

Appendix A to Petition

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APPENDIX A TO PETITION

51 T. C. No. 73

TAX COURT OF THE UNITED STATES

Docket No. 4335-67 Filed February 6, 1969.

T, an employee of the Federal Aviation Agency (FAA) lived together with his wife and children on Wake Island. They purchased supplies (consisting primarily of groceries) from an FAA commissary for family use, paying cash therefor on a monthly basis. Held, the amounts thus expended for such supplies may not be "excluded" from T's wages as "meals" furnished to him by his exployer. Section 119, I.R.C. 1954.

H. Thomas Kay, Jr., for the petitioners.

Aaron S. Resnik, for the respondent.

The Commissioner determined deficiencies in income tax in the amounts of $354.49 for 1963 and $320.96 for 1964. Petitioner Michael Tougher was an employee of the Federal Aviation

Agency ("FAA"), stationed at Wake Island where he lived with his wife and children in a house which he rented from the Government. He and his wife purchased supplies (consisting primarily of groceries) for family use at a commissary maintained by FAA. The family had most of its meals at the house in which they resided. The principal issue is whether the cost of the supplies may be "excluded" or deducted from gross income as "the value of * * * meals * * * furnished to * * * (the employee) by his employer * * * on the business premises of the employer" under section 119 of the 1954 Code.

FINDINGS OF FACT

Many of the facts have been stipulated by the parties and are incorporated herein by this reference.

Petitioners, husband and wife, lived on Wake Island in the central Pacific Ocean at the time of filing the petition in this case. They filed joint income tax returns for 1963 and 1964 with the appropriate office of the Internal Revenue Service. The husband will sometimes herinafter be referred to as petitioner.

During the years at issue, petitioner was an electronic technician employed by the Federal Aviation Agency ("FAA") at its facilities on Wake Island. He worked on electronic systems located at various places on the island. He was on call 24 hours a day, and, while his normal work week was 48 hours, after hours calls occurred about three times a week, resulting in an average work week of 54 hours. During the years at issue, petitioners and their children lived in a duplex residence on Wake Island provided by the FAA. Petitioners had three children in 1963 and four children in 1964. The FAA required all employees as a condition of their employment to live on the island in FAA housing. Petitioners paid rent on their house by means of a payroll deduction.

Wake Island is a United States possession, used primarily as a refueling station for military and commercial aircraft. Roughly 75 percent of all trans-Pacific air traffic uses Wake Island for refueling purposes. The island is administered by the FAA pursuant

to an agreement with the Secretary of the Interior that all executive, legislative, and judicial authority vested in the Secretary shall be exercised by such persons as may be disignated by the administrator of the FAA. Part 165 of the Federal Aviation Regulations is the Wake Island Code. 14 CFR 165. Under the Code, executive authority over the island is vested in the Area Manager of Wake Island. In addition to handling air traffic and aviation communications, the FAA provides a variety of supporting community facilities, including power, water, roads, housing, a commissary store, certain mess facilities, maintenance shops, police and fire protection, public health and medical services, and a school with classes from kindergarten through the ninth grade.

During the years at issue, the population of Wake Island was approximately 1,300, of whom about 290 were FAA employees and about 285 were dependents of FAA employees. About 128 FAA employees lived with their families on Wake Island (such employees are sometimes hereinafter referred to as "accompanied employees"); the other FAA employees either had no families or were not accompanied by them (such employees are sometimes hereinafter referred to as "unaccompanied employees" or "bachelors" regardless of whether they were in fact unmarried). The Wake Island Area Manager preferred to have accompanied persons employed on the island to insure greater continuity of service. The other individuals on the island included persons associated with Pan American Airways, "Standard Oil", the United States Navy, the United States Coast Guard, a Military Air Command contractor from Los Angeles, and the Facilities Management Corporation.

The food facilities on Wake Island included an FAA central dining room or mess hall, an FAA commissary, a Pan American mess for Pan American employees, a Facilities Management Corporation mess for nongovernment employees, a restaurant or snack shop operated privately pursuant to contract in conjunction with a bowling alley ("Al Ching's") and an air terminal coffee shop (also operated by Al Ching).

The FAA facilities were established pursuant to various public laws and agency policy directives.

Civil Aeronautics Administration[1] Order BU 2500.11, dated February 23, 1951 states in part:

> Accordingly, in order to discharge the responsibilities imposed upon the CAA by Section 10 of P.L. 647 and at the same time to maintain the integrity of funds as appropriated by Congress it shall be the policy of the Civil Aeronautics Administration to:
>
> (1) furnish, preferably through concessionaires, such items, facilities, and services as fall within the scope of Section 10 (a) of the Act; if such items, facilities, and services cannot be furnished through concessionaries they should be provided for directly by the CAA;
>
> (2) charge the users of such items, facilities or services at rates specified in the Federal Register, or, when not specified in the Federal Register, at rates approved by the Washington Office;
>
> (3) on an agency-wide basis, reimburse the S & E, CAA appropriation from which the costs of such additional items, facilities, or services were paid, from funds received as a result of direct sale or charge, with that portion of collections which is equivalent to the cost of such additional items, facilities, or services, incurred pursuant to P.L. 647;

This order was superseded by FAA Order OA 2500.5, dated February 28, 1964, which provides in part:

> 4. b. Public Law 390, 81st Congress provides that where adequate subsistence supplies are not available from normal sources commissary facilities may be established for the purchase, transportation, storage, and distribution of food and other personal subsistence supplies for resale to employees of the Federal Aviation Agency and other Federal agencies and their dependents in Alaska and other points outside the continental United States. It also provides for the

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1. The Civil Aeronautics Administration (CAA) was the predecessor of the FAA

establishment, maintenance, and operation of messing facilities, by contract or otherwise, to provide meal service to employees of FAA and of other Federal agencies and their dependents where suitable family facilities are not available and meals cannot be obtained reasonably from commercial sources. According to this law, proceeds from commissary resales and from messing services are to be credited to the appropriation from which the expenditures are made. Public Law 390 also authorizes the furnishing and maintaining of quarters for FAA employees at remote localities not on foreign soil where such accommodations are not otherwise available.

* * * * * * * * * * * * * *

5. b(3) Commissary, Messing, and Domestic Activities. Sales prices of goods and supplies at commissaries and rates for messing and domestic services will be established by the cognizant regional director and maintained to approximate local or public rates, including applicable comsumer taxes, for similar items in a representative community within the region where the facilities are located. Based on price surveys conducted at reasonably frequent intervals, and in any event not less than biannually, rates should be adjusted by retional directors as considered necessary.

FAA Regional Order PC-4230.1, effective on February 1, 1961, provides in pertinent part:

3. General Policy – It is the policy of FAA to provide commissary and messing facilities at remote and isolated locations where the Federal Aviation Agency is the prime user and where adequate facilities from other sources are not available.

* * * * * * * * * * * * * *

5. Commissary

a. Use – All FAA employees and their dependents stationed at Wake and Canton Islands are entitled to commissary privileges. At the discretion of the Island Manager, use of the commissary may be extended to employees of other Federal Agencies and their dependents. Any further extention must be approved by the